SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

OLGA SHOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR LIBELLANT-RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR LIBELLANT-RESPONDENT

Counter-Statement of Questions Presented

1. Whether a state, in enacting a Wrongful Death Act, may refer the standards of liability to the standards to be applied if the deceased had lived which, in the case of an accident on navigable waters of the United States, would be the general maritime law?

2. Whether the words "wrongful act, neglect or default" as used in the New Jersey Wrongful Death Act include an action based on unseaworthiness?

3. Whether the New Jersey Wrongful Death Act, which does not specify in the statute what defenses, if any, are available under its terms but uses a referral test for liability thereunder, incorporates the Maritime Law Rule of comparative negligence where such Rule would have been applied to an action by the deceased if he had lived?

Counter-Statement of Facts

This case involves an appeal in admiralty from a judgment dismissing a libel (R. 579), which judgment was reversed and the case remanded after an *en banc* decision of the United States Court of Appeals (R. 597).

The libel states four causes of action. The first cause of action is based on unseaworthiness, the second is based on negligence. Both plead the Wrongful Death Act of New Jersey, N. J. S. A. 2A:31-1 *et seq.* (R. 4-8). The third and fourth causes of action are survival counts based on unseaworthiness and on negligence respectively, and were for the pain and suffering etc. of the deceased himself (R. 8-11).

On December 6, 1952 at approximately 1:25 p.m. the m/v Tungus, petitioners' vessel carrying a cargo of coconut oil, among other things, was tied up at Bayonne, New Jersey. The vessel had been docked at about 5:30 p.m. the prior afternoon and had been in the process of discharging some coconut oil from the port tank of the vessel (R. 559; R. 560; Exh. R-6, R. 563). El Dorado Oil Works, the respondent-impleaded and employer of the deceased, was receiving the oil from the vessel.

The Chief Officer of the vessel and the officer-on-watch were on duty (R. 299). In addition the Chief Officer had

ordered two men to remain on board all night to help in discharging oil. These men were "to be used on ship's equipment, to drive winches, and to hoist their equipment on board the ship" (R. 299). These men were paid overtime by the vessel for remaining on duty (R. 338). The Captain of the vessel had remained on board the vessel that night (R. 316) as did other members of the crew (R. 190; R. 350).

According to Mr. Wagner, an employee of El Dorado, called to testify by respondent-impleaded, he had received orders from the deceased to repair the pump to be used in unloading petitioners' vessel and to check it on the morning of the day before the accident (R. 453). They checked it after Wagner finished, found it in good working order and it was then taken to the pier to await the arrival of respondents' vessel (R. 454). The deceased had nothing further to do with this pump until he boarded petitioners' vessel about 1:25 a.m. the following day (R. 460).

The pump and hoses were taken on board at about 6:30 p.m. and they commenced to pump oil at about 8:05 p.m. (R. 560, Exh. R-6).

Mr. O'Leary, an El Dorado employee, was called by respondent-impleaded to testify. He was the one who had the job of getting the pump installed and started (R. 456). He stated that the ship's crew had taken off the tank cover with the ship's winches and were turning it to an angle across the tank top when he went on board to place the pump (R. 457). The Mate was giving signals to the persons "who were manipulating the tank lid" (R. 457). O'Leary told the crew to place the pump "so that the suction side would be at the open hole" (R. 458). The ship's crew helped him by holding the hose while he bolted the hose in place (R. 462). The pump operated in a "satisfactory condition" until he was relieved at 8:30 or 8:40 p.m. by Mr. Sampson, another El Dorado employee (R. 459; R. 463). Sampson was

"standby on the pump" until 11:00 p.m. and he testified that the pump "was working good, very good" (R. 476).

The Chief Officer claimed that at about 9:00 p.m. he received a report from the Second Mate, who was on watch (R. 302). As a result he went over and looked down in the hatch. He saw no one attending the pump so he went to Mr. Sexton's office on the pier and told Mr. Sexton, the man in charge of shipping and receiving for El Dorado, that they should have a man standing by on the pump and that there was something wrong with the pump because it smoked (R. 303). Somebody came on board and took care of that (R. 303). This alleged incident was not recorded in the ship's log (R. 560, Exh. R-6).

Another incident was related by Mr. Mallet, a cargo surveyor, whose firm is still retained by Barber Lines, the agents for respondents in New York, who testified for respondents (R. 51; R. 70; R. 258; R. 273). He had finished his duties at about 8:00 p.m. (R. 266). He remained on board the vessel that night as a matter of personal convenience (R. 267). At about 11:45 p.m. the Third Officer told him that there was some oil leaking from the pump. It wasn't much of a leak. When he came out again, later he observed that "oil was now spurting at a great rate" (R. 268). He stated that "there was oil on everything, all over the place" (R. 276). He stated that the smaller leak he first observed was the start of the larger leak that developed (R. 280). At that point he stated "the Chief Officer and I went down below to the 'tween deck to inspect the cargo down there" (R. 270). According to Mr. Mallet's notes at 12:45 p.m. the leak was repaired and the El Dorado men were trying to start the pump again but they failed. He then left and went into the "officer's accommodations" (R. 271).

The fact that the pump was leaking came to the attention of the Chief Officer at 12:15 a.m. from the officer on watch

(R. 304). The Chief Officer went on deck and he looked down and saw "oil was spurting out of the hold" (R. 304). The officer on watch went to get the El Dorado men. The Chief Officer went down in the hold "because a lot of oil had been thrown around by the leak, and cargo had been damaged" (R. 304). After the inspection he had an argument with Mr. Sexton about responsibility for the damage to the cargo on the vessel and he "told also to sweep the tank hold —tank covers, where the crew was working on." The Chief Officer also claims he offered sand and sawdust to Mr. Sexton "in order to minimize the danger of slipping in the oil" (R. 305). He stated that the leak had caused oil to be on the tank lids and on the shelter deck and oil "was all over the place" (R. 346). He stated that the reason he "suggested" to Mr. Sexton that he put sawdust on the oil was "in order to secure safety" (R. 347). However, he stated that he was not concerned with the safety of the El Dorado men who might have been working around there (R. 329).

Prior to the occurrence of the leak and at about 11:00 p.m. Mr. Sampson was relieved as standby on the pump by Mr. Russo, a maintenance mechanic's helper (R. 476). Russo was under the jurisdiction of Mr. Sexton, the El Dorado receiving foreman at that time (R. 187). He reported to Mr. Sexton for duty (R. 220). Mr. Sexton testified that Russo "was loaned from the Maintenance Department, which was due to a union deal that we had down there" (R. 498).

About 20 minutes after he got there, Russo testified that he went out to the pier for some rags and when he came back "one of the crew yelled that there was a break in the pump, a leak" (R. 188; R. 505). Russo testified that he shut off the pump and the ship's crew, with a sledge hammer, put a peg into the nipple opening on the pump to stop the leak (R. 188-190). This occurred according to Russo at about 11:25 or 11:30 p.m. (R. 190).

After the pump had been shut off and the oil stopped Russo went to the pier to inform Mr. Donohue, the assistant maintenance foreman (R. 194; R. 143). Donohue went on board with Russo and they surveyed the situation, obtained some more fittings and repaired the pump. Then they tried to "get suction" on the pump but couldn't (R. 194; R. 157). While Russo and Donohue were working, there were officers and crew members on the same deck in the area (R. 190; R. 195; R. 155).

When Russo and Donohue started to work around the pump they "squeeged" some of the oil from the tank lid around the immediate working area, but they didn't clean the tank lid completely (R. 155; R. 199; R. 443; R. 444). At this time Russo was not working under Donohue, who was assistant to the deceased in "supervising maintenance work," but was working as "standby on the pump" for Sexton (R. 142; R. 143; R. 187; R. 444).

When they couldn't get suction on the pump, Donohue talked to Sexton and they decided to call the deceased (R. 156; R. 484).

The deceased, Carl E. Skovgaard, was employed by respondent-impleaded, El Dorado Oil Works, as a maintenance foreman about 2½ to 3 years before his death (R. 129; R. 246). Prior to the time he worked for his concern, he worked for Westinghouse in "the machine shop" and he worked for Sperry Gyroscope (R. 132). On the night of the accident, the deceased was home with his wife having coffee and pizza pie when a call came from the plant (R. 134).

Mr. Sexton, a witness for respondent-impleaded, testified that he was the "shipping and receiving foreman" for El Dorado at the time of the accident (R. 481). He checked the temperature and the depth of the oil in the tank with the surveyor when the vessel came in (R. 481). He went

on board again after they started pumping oil (R. 482). Later he received notice from either Russo or Donohue that there had been a break in the pumping operation (R. 482). He went on board again approximately at midnight (R. 482). Later when he returned from calling the deceased, he had a conversation with the Chief Officer of the ship (R. 484; R. 508). They had a "heated discussion" about a statement for damaged materials which the Chief Officer wanted Sexton to sign (R. 484). Sexton denied that any conversation was had about the placing of sand and sawdust on the oil in the shelter deck (R. 484). During the time Sexton was talking to the Chief Officer, the deceased came on board (R. 484).

Before proceeding with the narrative, we consider the situation which existed. The positioning of the tank top cover is shown in Exh. R-10 (R. 567). This picture was taken in 1955 when the scene was recreated by Mr. Mallet on behalf of petitioners (R. 274; R. 279). The hatch coaming on the tank was stated to be 35 inches high (R. 285). After the accident he made measurements and found the oil 22 feet down from the tank coaming on one side and 21 feet 7¾ inches down on the other side giving the vessel a list of 2 degrees 6 minutes (R. 291). The tank was about 30 feet deep (R. 72). The witness stated that the tank cover was 9 feet 8 inches long but he didn't measure its width (R. 292). Russo stated that the tank was about half open (R. 185). From the photograph it would appear that the unguarded tank opening at the time of the accident was at least 4 feet by 5 feet, and the depth of the hot oil was at least 8 feet (R. 567, Exh. R-10). The temperature of the oil was 117° F. (R. 559, Exh. R-6). Russo and Donohue testified that there wasn't sufficient light provided by the vessel (R. 161; R. 214).

Exhibit R-10 (R. 567) shows the location of beams between the two tank tops (R. 275). Mallet testified that these

beams were 9 inches high at the end and 12 inches at the middle (R. 285). This means that these iron beams laying between two tank coamings were not completely level. The vessel had placed the two iron hatch beams in the walkway between the two tank coamings. The wooden hatch covers were put "out of the way" in another spot by the crew. The iron beams were not removed from their location in the walkway between the two tank coamings even though the Chief Officer of the vessel knew that the El Dorado men were to work in that area (R. 326). Donohue stated that the beams took up most of the walkway between the hatch coamings (R. 150). The deck near the tank was made of steel (R. 151).

There was testimony by Russo that when the crew had put a peg into the leaking hole immediately after the leak was discovered no more oil came out of the pump or the pump connections (R. 190). Russo estimated the time to be 11:25 or 11:30 p.m. (R. 190). It appears that coconut oil remained on the tank cover, the hatch beams and adjoining area for at least one hour before the accident to the deceased without any action being taken by the officers and crew of the vessel to reduce the hazard created by this oil near an open unguarded tank of hot oil where men had to work (R. 200). The petitioners admit that no guards or ropes were placed around the tank opening (R. 198; R. 180).

This was the situation which existed when the deceased came on board. The court below stated that at 1:25 a.m. the deceased boarded respondents' vessel. He went down to the shelter deck to assist Donohue and Russo. He moved from the foot of the ladder which led from the main deck. As he walked aft of the port tank he stepped on the hatch beams and while attempting to step on to the tank top, he "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (R. 573).

Russo described the accident. He stated that he first noticed the deceased at the port side ladder while he and Donohue were trying to get suction on the pump after it had been repaired (R. 196). There was no oil aft of the port tank where the deceased had been standing (R. 205). From this position at the ladder the deceased had instructed them to start the pump and to shut it off. When they couldn't get suction he walked around to the starboard side. He "walked over casual like, the way he normally would" (R. 198). He "stepped up on a beam and commenced to come forward" (R. 197). He had one foot on the tank top and the other foot slipped and the deceased went into the open unguarded tank (R. 198; R. 225). Nobody had given the deceased any warning of any kind such as "Be careful, it is slippery around here" (R. 198).

Donohue also saw the deceased fall into the tank. He stated that the deceased slipped on oil from between the hatch beam and the hatch cover (R. 159). Sexton testified he looked down into the shelter deck after his argument with the Chief Officer. He observed the deceased in the after port corner of the shelter deck (R. 485). Then he observed the deceased walking around the after end of the port tank and he saw the deceased put one foot up on the beam between the tanks. When the deceased "attempted to put the other foot on the hatch cover" he slipped (R. 486).

Russo went down the ladder inside the tank and then Donohue went down, too. They climbed down on a walkway in the tank and they looked for the deceased but didn't see him. Then a rope was dropped to them. They tied it to the ladder across the top of the oil. Russo grabbed hold of the rope and probed for the body in the oil with his feet. In the meanwhile a light was dropped. Finally they recovered the body of the deceased which was removed in a

basket (R. 160; R. 214; R. 438-441). Sexton left the vessel and called an ambulance (R. 487). Sexton brought back a metal stretcher from his office with the Chief Officer of the vessel, but he stopped at the top of the gangway and did not go aboard the vessel (R. 487). The death certificate for the deceased states among other things that the cause of death was "suffocation and shock following submersion in oil" (R. 133; R. 547, Exh. L-7).

The pump crew left the ship after the accident. A new pump gang came on board at 3:30 a.m. (R. 561, Exh. R-6). O'Leary, who was the first man to return, found that everything had been "sawdusted down" and ropes were being put up by the ship's crew (R. 466; R. 467).

The Captain of the petitioners' vessel had testified on deposition concerning the duties of the ship's officers. He stated that it was part of the duties of the Chief Officer on the vessel "to look after the cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (R. 74; R. 523). It was the Chief Officer's duty to conduct inspections of the vessel while discharging operations are going on (R. 75; R. 523). It was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions, it was his duty to correct them (R. 76; R. 78; R. 524).

The Chief Officer of the petitioners' vessel testified concerning his duties. He stated that everything concerning the cargo is the Chief Officer's duty (R. 316). As Chief Officer, he inspected the vessel, while in port at least once an hour "going around the ship, looking in the hatches, and see that the cargo is discharged properly" (R. 317). He considered these inspections as part of his duty (R. 318). He stated that if he observed any unsafe condition which might cause injury to anybody aboard the vessel,

it was his duty to do something about it "as long as it is possible" (R. 318).

At the time of his death, the deceased was 43 years of age (R. 547, Exh. L-7). His widow, age 40, and three infant children, Christine, age 4, Carol, age 13, and Mary Elizabeth, age 16, survived him (R. 127; R. 128). He was in perfect health and his earnings exceeded $6,000.00 per year at his death (R. 129; R. 130; R. 485, Exh. L-4). He gave all of his earnings to the support of his wife and children with the exception of about $500.00 per year which he retained for himself (R. 131).

The opinion of the trial court is reported in 141 F. Supp. 653 (D. C. N. J. 1956). The court did not consider the issue of unseaworthiness and did not make any fact findings on this issue. The court found that there was no negligence on the part of petitioners' vessel in leaving the tank open, and in leaving the hatch beams between the tank coamings. The court found that there was sufficient light. As to the presence of oil on the tank lid, beams, and deck area near the tank, the court stated (R. 576):

> "I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. * * *"

The libel was dismissed and the impleading petition was dismissed (R. 577). Libellant appealed to the United States Court of Appeals for the Third Circuit (R. 577). The respondents then appealed from the dismissal of the impleading petition (R. 579). The argument on appeal was heard first by three judges and subsequently was set down for rehearing before the Court en Banc (R. 581). The dismissal of the libel was reversed and the case was re-

manded (R. 597). Judge Staley, writing the majority opinion, stated that the trial judge had misconceived the nature of the wrongful death cause of action (R. 584). He interpreted the New Jersey Wrongful Death Act, stating that he words "wrongful act, neglect or default" as used in the statute permits recovery for unseaworthiness as well as negligence. With reference to the statement of the trial court, quoted above, Judge Staley stated (R. 587):

> "While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, * * *. The personnel of the *Tungus* were well aware of the existence of the oil spill and the danger created by it.
>
> * * *. It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * *"

This court has granted certiorari (R. 597).

Summary of Argument

The deceased, if he had lived, would have had his rights and duties with relation to petitioner's vessel, which was not on the high seas but was in the navigable waters of the United States, determined by the general maritime law. However, since his injuries resulted in his death an additional factor appears. The general maritime law, which has no positive rule denying recovery for wrongful death but merely has a void in the general body of maritime law on this question, in order to permit a remedy in this situation adopts and enforces a state wrongful death act where it would otherwise apply. Where, as in the case of the New Jersey Wrongful Death Act, it appears that the statute itself makes the test of liability the rights of the deceased if he had lived there is no conflict between the general maritime law and the state statute. The maritime law would determine the rights of the deceased if he had lived and hence the state statute incorporates the general maritime law by reference in this situation.

Only if it were concluded that the state statute, in spite of its referral language, required the application of state-law principles of analogous land situations does the possibility of conflict between state law and general maritime law arise. The New Jersey Wrongful Death Act does not present such a problem. If it did, the general maritime law would adopt only so much of it as is necessary to fill the void in the general maritime law and the rest would fall in the face of the positive rules of maritime law. The rule of comparative negligence is a positive rule of the maritime law.

The rule of comparative negligence would be applied in this case because the New Jersey Wrongful Death Act does not specifically list the defenses which would be avail-

able to a person sued under its provisions but uses language referring to the right of the deceased to maintain an action if he had lived. In addition, even if the New Jersey statute did provide specifically for the defense of contributory negligence of the deceased where an action was instituted by a non-negligent widow and children the general maritime law would apply its own positive rule of comparative negligence rather than the discredited common-law rule of contributory negligence.

In addition to the referral features of the statute, it uses the words "wrongful act, neglect, or default" which are broadly construed in accordance with the remedial intent of the legislature in enacting the statute. It therefore includes an action based on unseaworthiness as well as on negligence.

Since the deceased was doing work on equipment being used to discharge oil from a vessel, he was entitled to both a safe place to work and a seaworthy vessel. He was given neither.

The issue concerning the duty owed to one injured by a defective appliance or condition which he is employed to correct does not arise in this case. It is clear from the evidence that the injury and death of the deceased were caused by the condition of the deck in the area of the open tank of hot oil. It was not the duty of the deceased to remedy that situation. The petitioners admit that they had knowledge of that situation. They had an absolute and non-delegable duty to remedy it. They did not do so.

The trial court had misconceived the law to be applied in this case, and consequently no findings of facts were made on the pertinent issues. The facts in the record justify findings in favor of the libellant. The decision and judgment of the Court of Appeals should be affirmed.

POINT I

The New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 et seq. will be adopted and applied to supplement the general maritime law and will permit recovery for both negligence and unseaworthiness where the injury and death occurred in navigable waters within the geographical limits of New Jersey.

(a) ***A Court of Admiralty applying the general maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law where a maritime wrong occurs within the geographical limits of a state upon navigable waters.***

A Court of Admiralty will adopt a state wrongful death act to supplement the general maritime law. *Old Dominion SS Co.* v. *Gilmore,* 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264 (1907); *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); *Just* v. *Chambers,* 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Levinson* v. *Deupree,* 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

In the *Old Dominion SS Co.* case, *supra,* the appeal was from a decree allowing claims for a loss of life in a limitation proceeding. The accident happened on the high seas between two vessels owned by Delaware corporations. Certiorari was granted to review the question whether a Delaware Wrongful Death Statute applied to a claim for death on the high seas arising purely from tort in proceedings in admiralty. Mr. Justice Holmes speaking for the court answered in the affirmative. Among other things he stated at page 135 of the Supreme Court Reporter:

> "We pass to the other branch of the first question, 'whether the state law, being valid will be applied in the admiralty. Being valid, it created an obligatio,—a personal liability of the owner of the Hamilton to the claimants. * * *"

In 1920 Congress passed an act relating to actions for death on the high seas, 46 U. S. C. A. 761 *et seq.* The statute covers the specific situation in the *Old Dominion SS Co.* case, but does not affect the principle of law involved.

In the *Western Fuel Co.* case, *supra,* it was held that the limitations period of the California statute prevented an action from being filed in admiralty for wrongful death after the time prescribed by the California statute. However, in the course of his opinion Mr. Justice McReynolds stated at page 242:

> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. * * * "

In the *Just* v. *Chambers* case, *supra,* the court reviewed the question of the enforceability of claims for personal injuries against the estate of a deceased tortfeasor. In holding that such claims could be heard in admiralty, among other things, Mr. Chief Justice Hughes in the course of the court's opinion stated at page 388:

> "* * *. With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. * * *.
>
> "This is illustrated, in the cases cited, by the effect given in admiralty to state legislation creating liability for wrongful death. The leading continental States of Europe, whose jurisprudence was developed from the civil law have given a remedy in such a case, but

a right of action was denied by the common law and likewise by the admiralty in England. And the Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law.' * * *. The absence of a federal or state statute giving a right of action was emphasized. But when a state, acting within its province has created liability for wrongful death, the admiralty will enforce it."

In *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955), the issue before the court was whether an action under the Jones Act survives the death of the tortfeasor. The difficulty which faced the court was that neither the Jones Act, 46 U. S. C. A. §688, nor the F. E. L. A., 45 U. S. C. A. §57, which it incorporates by reference, specifically provides for the survivorship of actions against deceased vessel owners. The court liberally construed these acts and found that such actions did survive on the basis of the "policy" of the act and the harshness of a contrary result. In addition Mr. Justice Clark, speaking for the court, commented at page 210:

"* * *. Since the decision here is confined to an interpretation of the Jones Act, there is no need to consider the 'slender basis' for the general admiralty rule against such survivorship of actions. See Just v. Chambers, 312 U. S. 383, 387, note 4, 61 S. Ct. 687, 691, 85 L. Ed. 903. Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion of Roscoe Pound on death statutes as part of the general law, 13 NACCA L. J. 188-189 (May 1954)."

The *Cox* case, *supra*, while it involves the Jones Act, is significant because the last cited reference is a comment by Dean Pound on the case of *Graham* v. *Lusi*, 206 F. 2d 223 (5 Cir. 1953). This case held that the Florida Death by Wrongful Act Statute, *as interpreted by the Florida Supreme Court*, was not broad enough to cover an action based on unseaworthiness. Dean Pound apparently feels that it is time for the entire concept that wrongful death is non-remediable in a common-law or maritime action to be overhauled to meet current conditions. Among other things, Dean Pound stated at page 189:

> "* * *. Lord Campbell's Act is now well over a century old and has been adopted in every common-law jurisdiction. To think of recovery for wrongful causing of death as something exceptional not to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law. * * *."

The Supreme Court cases discussed herein reveal that, while the general rule that the general maritime law does not provide for recovery for wrongful death is not overthrown, there has been developing a broad liberal view in adopting the wrongful death acts of states, where applicable, to supplement the general maritime law in this respect. It would seem that as a matter of construction, in view of this tendency toward a broad liberal construction, that a state wrongful death act should be construed to include maritime actions based on both negligence and unseaworthiness unless there is a clear legislative intent manifested in the act to discriminate against one or the other ground. The New Jersey Wrongful Death Act exhibits no such discriminatory tendency.

(b) *The Wrongful Death Act of the State of New Jersey, N. J. S. A. 2A:31-1 et seq., permits recovery for such "wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages* * * *"

It has been held that the maritime law will enforce a cause of action for death based on negligence applying the New Jersey Wrongful Death Act. *Gill* v. *United States*, 184 F. 2d 49 (2 Cir. 1950). The maritime law will enforce a cause of action for death based on unseaworthiness applying the New Jersey Wrongful Death Act.

This accident happened aboard a vessel docked at Bayonne, New Jersey (R. 69) and therefore the Wrongful Death Act of the State of New Jersey is applicable.

The action for death in the case at issue was based on two distinct grounds of recovery: (1) for negligence, and (2) for unseaworthiness.

N. J. S. A. 2A:31-1 sets forth the following test of liability:

> "When the death of a person is caused by a *wrongful act, neglect or default, such as would,* if death had not ensued, *have entitled the person injured to maintain an action for damages resulting from the injury,* the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages. * * *." (Italics ours.)

There are two key phrases in the part of the statute quoted above. The first is the phrase "wrongful act, neglect or default.". The other is the descriptive phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages."

First we discuss the "such as" phrase which directly indicates that the "wrongful act, neglect or default" which it describes has the same scope as the "wrongful act, ne-

glect or default" which would give rise to an action by the deceased himself for personal injuries if he had lived. It is stated in relative terms and it avoids fixing the basis of liability as that existing at the time the statute was enacted. It permits the concepts of liability to develop with the rights of the individual. This is not the kind of statute that requires amendment with every new development in the substantive law of liability for personal injuries. It is rather an act designed to provide for dependents described in the act the same basis of liability as the individual has. It provides for neither more nor less. While the measure of damages may differ in the case of dependents, the basis of liability is coextensive in both wrongful death and personal liability cases. The "such as" clause establishes that the legislature did not intend it to be otherwise. Since the accident happened on navigable waters, the liability of the defendant to the deceased would be determined by the maritime law.

In an older case, *Consolidated Traction Co.* v. *Hone*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of Atlantic:

> "• • • From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? • • • " (Italics ours.)

The above is quoted with approval in *Bastedo* v. *Frailey*, 109 N. J. L. 390, 162 A. 621 (D. & A. 1932).

In the case of *Paulmier* v. *The Erie R. R. Co.*, 34 N. J. L. 151 (Sup. Ct. 1870) Chief Justice Beasley had commented at page 157:

"* * * It seems to me that the literal language of the statute is to be followed, that is, a right of action exists in all cases in which such right would have existed in the party injured if death had not ensued, * * * "

The referral nature of the statute was recognized in the case of *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. Ct. 1932). The plaintiffs had brought an action under the New Jersey Wrongful Death Act where the Statute of Limitation had barred the claim of the deceased before death. The action was dismissed on motion. After quoting the statute Justice Bodine stated at page 661:

"It is, of course, arguable that, since the actions are separate, the only bar to the action under the Death Act is the bar contained in the act itself. *But the statute only gives an action if the decedent had one.* In the present cases, the decedents' actions were lost by lapse of time. Since the decedents had no cause of action, their representatives had none. * * * " (Italics ours.)

It would be an unjust result and a harsh construction to interpret the statute with respect to some given basis of liability to say that the deceased, if he had lived and were totally disabled as a result of an injury, could receive (in addition to other elements of damage) his past and future loss of earnings; while if he died, his widow and infant children whose lives and happiness depend in large part on such earning power would be left remediless and in many cases penniless. It would thwart the obvious policy of the wrongful death act and certainly would not give the act the liberal construction intended.

In *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865), Chief Justice Beasly had stated in connection with the interpretation of this act at page 350:

"* * * The design of the act cannot be mistaken. It is entirely and in the highest sense remedial in its

nature. Its object was to abolish the harsh and technical rule of the common law-actio personalis moritur cum persona. The rule had nothing but prescriptive authority to support it; it was a defect in the law, and this statute was designed to remove that defect. It is, therefore, entitled to receive the liberal construction which appertains to remedial statutes."

The remedial nature of the statute was recognized again in *Murphy* v. *Board of Chosen Freeholders of Mercer County,* 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). It was claimed that the word "corporation" used in the New Jersey Wrongful Death Act was not broad enough to permit actions to be instituted under the act against public, municipal, or quasi municipal corporations. This argument was rejected by the court, Judge Lippincott stating at page 231 of Atlantic:

"* * * In the construction of a remedial statute, the rule is to avoid all subtle inventions and evasions for the continuance of the remedy, et pro privato commodo. The duty of the court is to add force and life to the cure and remedy, according to the true intent of the maker of the act, pro bono publico. * * *"

See also *Hartman* v. *City of Brigantine,* 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957); *Turon* v. *J & L Const. Co.,* 8 N. J. 543, 86 A. 2d 192 (1952); *Cetofonte* v. *Camden Coke Co.,* 78 N. J. L. 662, 75 A. 913 (1910); *Carianni* v. *Schwenker,* 38 N. J. Super. 350, 118 A. 2d 847 (App. Div. 1955).

In this case, the deceased would have had two causes of action for personal injuries: (1) for negligence (2) for unseaworthiness. The intention of the legislature was in the event of his death, to give his dependents the same causes of action which he would have had, if death had not ensued. It follows that the legislative intent was to give to the dependents of the deceased both causes of action (1)

for negligence and (2) for unseaworthiness which he would have had if he lived.

Keeping in mind the remedial nature of the statute we now consider the meaning of the phrase "wrongful act, neglect or default." If the phrase were intended to be confined to acts of "negligence" the words "wrongful act" and "default" are unnecessary. In construing a statute, courts do not readily assume that words in a statute are superfluous. Both the words "wrongful act" and "default" in their natural meaning connote something much broader than mere negligence. Negligence in a legal sense is always a "wrongful act" and is sometimes the result of a "default." However not all "defaults" constitute negligence, nor do all wrongful acts fall within that classification. *Judson* v. *Peoples Bank & Trust Company of Westfield,* 17 N. J. 67, 110 A. 2d 24 (1954).

Judge Lombard, who dissented in the *Halecki* case has subsequently stated that unseaworthiness is included in the phrase "wrongful act, neglect, or default" as those words are used in the New Jersey statute law. The case involved a construction of the New Jersey statute of limitations which uses that phrase. In *Oroz* v. *American President Lines, Ltd.,* —— F. 2d —— (2 Cir. Decided Sept. 30, 1958), affirming 154 F. Supp. 241 (S. D. N. Y. 1957) he stated:

> "* * *. Only recently we held that the same language, 'wrongful act, neglect, or default,' as used in the state's wrongful death act, N. J. S. A. 2A:31-1, encompassed an action based upon unseaworthiness. *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association,* 251 F. 2d 708 (2 Cir. 1958), cert. granted June 9, 1958. See also *Skovgaard* v. *The Tungus,* 252 F. 2d 14 (3 Cir. 1957), cert. granted June 9, 1958. Further, this Court has suggested that breach of the implied warranty of seaworthiness is a tort, *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, 558 (2 Cir. 1950), cert. den. 341 U. S. 904.

In any event, the construction of the New Jersey statutes by the New Jersey courts is determinative, and they have uniformly held that the two-year provision applies to all personal injury claims, whether based upon tort or contract. *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955); *Weinstein* v. *Blanchard*, 109 N. J. L. 332, 162 Atl. 601 (Err. & App. 1932). See *Martucci* v. *Koppers Co.*, 58 F. Supp. 707 (N J. 1945)."

The phrase "wrongful act, neglect or default" has been construed to include an action based on a breach of warranty of fitness for use under the New York statute. In *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938) the plaintiff's wife died as a result of eating infected pork frankfurters purchased from the defendant. The plaintiff's cause of action for negligence was dismissed by consent. The motion to dismiss the cause of action based on a breach of warranty was denied. Justice Rippey speaking for the New York Court of Appeals posed the issue at page 31:

"* * * The inquiry here is whether the breach of the implied warranty as alleged in the complaint, negligence being disclaimed, was a 'wrongful act, neglect or default' within the meaning of the statute. * * *"

After considerable discussion of the history and nature of the wrongful death acts, he stated at page 34:

"* * * At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. * * * Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public

policy. * * * Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default and, in its essential nature, a tort. * * *

"We conclude that the breach of the warranty in a case such as this was a 'default' or 'wrongful act' within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. * * *

" * * * Apropos are the words of Judge Cardozo in the closing paragraph of his opinion in Van Beeck v. Sabine Towing Co. * * * where he refers to the construction to be given death statutes. 'Death statutes,' he writes, have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow of grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * * * There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source or law, a new generative impulse transmitted to the legal system. * * * "

Cf. also *Sullivan* v. *Dunham,* 161 N. Y. 290, 55 N. E. 923 (1900); *Greenwood* v. *John R. Thompson,* 213 Ill. App. 371 (1919); *Roche* v. *St. John's Riverside Hospital,* 96 Misc. 289, 160 N. Y. S. 401 (1916) aff'd 161 N. Y. S. 1143 (App. Div. 1916); *Grein* v. *Imperial Airways Ltd.,* 1 K. B. 50; (1936) 2 All. E. R. 1258, C. A.; *Jackson* v. *Watson & Sons,* 2 K. B. 193 (1909); *The H. S. Inc. No. 72,* 130 F. 2d 341 (3 Cir. 1942).

There is every reason in logic and in justice to consider unseaworthiness a maritime tort which is a "wrongful act, neglect or default." In *Seas Shipping Co.* v. *Sieracki,* 149 F. 2d 98 (3 Cir. 1945) Judge Goodrich after pointing out that so far as "warranty" depended on contract, a stevedore was not a party to a contract, he concluded at page 101:

"• • • And so an injury to a stevedore comes within the classification of a marine tort. • • • "

The United States Supreme Court in the same case in 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), Mr. Justice Rutledge speaking, stated at page 877:

"• • • It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. • • • Carlisle Packing Co. v. Sandanger, supra, it is a form of absolute duty owing to all within the range of its humanitarian policy."

A seaman's remedy for unseaworthiness and his remedy for negligence are considered two aspects of a single cause of action. *McAllister* v. *Magnolia Petroleum Company*, —— U. S. ——, 78 S. Ct. 1201, —— L. Ed. —— (1958). In the case of *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956), Judge Waterman considered the various theories on which a federal court, sitting on the civil side, could have jurisdiction of an action based on unseaworthiness where an action for negligence under the Jones Act is also pleaded. In considering "pendent jurisdiction" as a ground he reviewed the nature of the two theories of recovery. He stated at page 258:

"• • • The Jones Act claim for negligence and the maritime claim for unseaworthiness provide seamen with two different grounds of relief for the commission of the same wrong. A judgment on one claim bars a second suit based on the other claim. • • • Since both claims are based on the same operative facts, they constitute a single 'cause of action.' • • • Because of the *extremely close relation* of the two claims, and the virtual identity of their factual components, it is arguable that a federal district court, having properly taken jurisdiction at law under the Jones Act over the negli-

gence claim, has jurisdiction at law over the closely related unseaworthiness claim. * * * "

In view of the "close relation" of causes of action based on negligence and unseaworthiness it is difficult to conceive why the broad "wrongful act, neglect or default" classification does not apply to both. See also the comment of Judge Learned Hand in *Gill* v. *United States*, 184 F. 2d 49, 57 (2 Cir. 1950).

Unseaworthiness falls within the broad classifications of "wrongful acts" or "defaults" if not "neglects." There is no reason to suppose that the legislature, while using referral language, intended to exclude "unseaworthiness" from the New Jersey Wrongful Death Act whenever it would otherwise apply. The broad language of the statute indicates a contrary intent. The liberal construction to which the statute is entitled also compels a contrary result. It certainly is not just, to deprive dependents of a right to recovery which the deceased himself would have had if he had lived, if the basis of liability is unseaworthiness, but to permit recovery where the basis is negligence.

Two Courts of Appeal have accepted the respondents' construction of the New Jersey Wrongful Death Act. They construed it remedial, referral in nature as to liability, and broad enough to include an action based on unseaworthiness as well as negligence. This construction is supported by the decisions of the New Jersey courts.

Not only was the deceased entitled to have a seaworthy vessel at the time of his injury on petitioner's vessel, but the widow and children of the deceased are entitled to sue under the New Jersey Wrongful Death Act for a breach of the duty to supply a seaworthy vessel where such breach of duty resulted in death.

POINT II

The petitioners owed the deceased the non-delegable duty to provide the deceased a reasonably safe place to work and its failure to fulfill its duty constituted negligence such as would, if death had not ensued, have entitled the person injured to maintain an action for damages.

Although the action for negligence arises by the application of the New Jersey Wrongful Death Act in admiralty, the standard of care is determined by the general maritime law and not by the substantive law of negligence of the State of New Jersey. Since the accident occurred in navigable waters, the general maritime law rather than New Jersey common law would apply. The New Jersey courts would have to apply federal concepts. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262, 264 (6 Cir. 1955); *O'Leary* v. *United States Line Company*, 215 F. 2d 708, 711 (1 Cir. 1954); *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 741 (3 Cir. 1912). In addition the "such as" clause of N. J. S. A. 2A:31-1, by definition, incorporates such rights of the deceased as he would have had if he had lived, which would refer to his rights under federal maritime law.

However, there does not seem to be any great variance between federal maritime law and the common-law of the State of New Jersey relative to concepts of negligence, excepting the matter of common-law defenses. The reference to federal maritime law is more for the purpose of accuracy of legal theory than for difference in practical effect.

In *Anderson* v. *Lorentzen*, 160 F. 2d 173 (2 Cir. 1947) the plaintiffs were longshoremen who contracted dermatitis

caused by handling leaky steel drums containing cashew nut oil. Plaintiff's employer knew that the liquid was a corrosive and even had a special preventive cream on the dock. Judge Chase, affirming a verdict for plaintiffs stated at page 174:

> "The defendants-appellants have argued that, since the employer of the stevedores who unloaded the liquid was aware of the danger, they were under no duty to warn those who worked for that independent contractor. We cannot agree. The defendants-appellants not only owed the duty to provide a seaworthy ship on which these stevedores who unloaded the cargo might work, Seas Shipping Co. Inc. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, but they owed them, as invitees, or business visitors, the duty to provide a reasonably safe place to do their work. Fodera v. Booth American Shipping Corp., 2 Cir., 159 F. 2d 795. *This duty was non-delegable and persisted despite any concurrent duty on the part of the stevedoring company.*" (Italics ours.)

The *Anderson* case, *supra,* was cited in a New Jersey case involving the common law, *Farrell* v. *Diamond Alkali Co.,* 16 N. J. Super. 163, 83 A. 2d 900 (App. Div. 1951). The *Farrell* case applied and followed the general negligence concepts stated in the *Anderson* case.

In *Santamaria* v. *Lamport & Holt Line,* 119 N. J. L. 467, 196 A. 706 (E & A 1938) the plaintiff sued for the death of her husband which occurred while he was engaged in removing his employer's cargo from a vessel. A judgment against the defendant shipowner was affirmed. Among other things, at page 707 of Atlantic Judge Wolfskeil stated:

> "* * *. The *consignee was an invitee,* and its *employees as consequential invitees* shared in the incumbencies due from defendant with respect to providing a reasonably safe place to work. * * *" (Italics ours.)

In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952) a judgment for a plaintiff longshoreman was affirmed. He claimed he was overcome by fumes from cargo while working on defendant's vessel and he sued also the manufacturer, shipper, and purchaser of the cargo. No claim of unseaworthiness was raised against the vessel. After stating that the state courts will look to the federal "substantive maritime law" for the principles and rules to be applied, Judge Conway then continued at page 320:

> "Under the maritime law a longshoreman who is employed by an independent contractor to load its ship, occupies the status of an invitee aboard the vessel. As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshoreman of hidden dangers devolves upon the owner of the ship. For a breach of that duty liability follows. * * *
>
> *"The duty is non-delegable and the fact that there is a concurrent duty imposed upon the longshoreman's employer to furnish him with a safe place to work does not alter the owner's liability.* * * *" (Italics ours.)

In distinguishing the *McFall* case the trial court commented that in that case the longshoreman was employed by an independent contractor "engaged by the owner" while in the present case, the employer of the deceased was engaged by "the owner of the cargo who was not the owner of the ship" (R. 576). Compare this, however, with *Santamaria* v. *Lamport & Holt Line, Ltd.*, quoted *supra*, and cited by the trial court as well (R. 575) where it was held that the employee of a consignee unloading cargo from a vessel was a consequential invitee entitled to a reasonably safe place to work and the duty to provide one devolved on the owner of the vessel. While the trial court did not say that the deceased was not an invitee with respect to the owners of the

vessel, that would seem to be the implication of the distinction made. Compare *Mayes* v. *Splitdorf Electrical Co.*; 94 N. J. L. 460, 111 A. 10 (E & A 1920); *Restatement, Torts* (1934), Sec. 332. In footnote 6 in *Pope & Talbot Inc.* v. *Hawn*, cited *supra*, Mr. Justice Black speaking for the court at page 413 cited cases illustrative of "the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowner's negligence."

In discussing the *Santamaria* case, quoted *supra*, the trial court stated (R. 576):

> "* * *. *Santamaria* does not hold that a shipowner is liable to a worker for a condition created by his fellow employees. * * *"

This statement ignores the established law that the vessel owner has the non-delegable duty to provide a reasonably safe place to work, regardless of who creates the hazardous conditions. That the employer of the deceased may have had a concurrent duty to provide the deceased with a safe place to work does not relieve the owner of the vessel of his primary duty. Suppose for example a fellow employee of the deceased had dropped a banana peel or other slippery substance on the deck of the vessel and the ship's officers knew of the condition. Would they not have a primary duty to the deceased to have removed the hazard? It can hardly be argued as a matter of common-law or maritime law that they had no such continuing duty.

The shipowner was held liable for failure to provide a safe place to work where the unsafe conditions were created by the employer of the injured party and his fellow employees in *McFall* v. *Compagnia Maritime Belge*, *supra*, where the plaintiff's fellow employees created the unsafe conditions by the rough handling of drums of carbon tetra-

chloride, in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 146 (1956) where the hazardous condition of improper storage was created by the plaintiff's employer, and in *Pioneer Steamship Co.* v. *Hill*, 227 F. 2d 262 (6 Cir. 1955) where the unguarded hole through which the plaintiff fell had been cut in the bunker by the injured man's fellow employees sometime before his accident.

As a matter of fact, in almost all cases of this nature, under maritime law, where recovery by a shipowner is allowed against the employer of an injured party it is implicit that the employer or the injured party's fellow employees caused the unsafe conditions to exist which caused the injury. See for example *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, L. Ed. (1958).

Judge Staley in the opinion written below stated (R. 588):

> "The duty of providing Skovgaard with a reasonably safe place to work, * * * would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. * * * *"

The trial court erroneously, as a matter of law, found there was *no duty* on the part of the vessel owner to provide deceased with a safe place to work. The court stated (R. 576):

> "* * * *. Moreover under New Jersey law when the employee of an independent contractor enters the property at the instance of the owner to correct the precise condition which later causes the employee's injuries the owner is not liable unless he supervised or controlled the employee. *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3 (E. & A. 1942). Here, Skovgaard boarded the vessel to help repair the defect and restore to

operation the pump which caused the oil spill. The entire operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump. * * * "

The trial court relied on the *Broecker* case, *supra.* In that case the decedent, an employee of a roofing concern fell through a defective roof which the decedent was repairing. Justice Case after citing a group of cases dealing with the duty to provide the employees of contractors a safe place to work stated at page 196 of Atlantic:

"An effective distinction between the instant case and the decisions to which we have been cited is that here we have an injury caused by the very condition which the plaintiff was engaged to correct and was in the act of correcting. * * * "

The important thing to note is that the *Broecker* case, *supra,* the deceased was caused to be injured and killed by the very condition he was in the process of repairing, i.e., a hole in the roof. In the present case, it was not the duty of deceased to open the tank or to put up the lights, or to place or remove iron beams between hatches, or to clean up oil on the deck. There was no proof of such duty. If a man was repairing a hole in a roof and he fell into the hole that would be one thing. However, if water had come in through the hole and made the floor below wet, slippery and dangerous, that would be an entirely different matter. Cf. *Mormino* v. *Leon Hess, Inc.,* 119 F. Supp. 314 (S. D. N. Y. 1953) aff'd on opinion below in 210 F. 2d 831 (2 Cir. 1954).

Judge Staley, writing for the court below stated (R. 588):

"* * *. It is relevant to note at this point that Skovgaard was called for the purpose of repairing the

pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * * "

Even if maritime law did not provide the test of liability, the New Jersey law does not help the petitioner. In the case of *Berquist* v. *Penterman*, 46 N. J. Super. 74, 134 A. 2d 20 (App. Div. 1957), cert. den. 25 N. J. 55, 134 A. 2d 832 (1957), Judge Goldman made the same distinction that Judge Staley did in this case. At page 25 of Atlantic, he stated:

> "The general rule is that an owner or occupier of premises who, by invitation, express or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in the invitation. * * * Point Pleasant seeks to escape liability under that rule by arguing the applicability of the exception engrafted upon it by the court in Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 7, 24 A. 2d 194 (E. & A. 1942); that an owner is not liable where an independent contractor or his employee comes upon lands by invitation 'to correct the precise condition which causes the injury.' * * * We do not consider the exception applicable to the instant case. Berquist's injury and eventual death *did not stem from a dangerous condition he was called on to correct*, or one which *necessarily inhered* in the work he was doing. * * * " (Italics ours.)

The *Broecker* case, *supra*, is essentially an assumption of risk case and should be contrasted with *Dixon* v. *United States*, 219 F. 2d 10 (2 Cir. 1955). In that case the chief officer of a vessel brought an action for injuries sustained in a fall when the top rungs of a ladder gave way while he was inspecting the ladder. The case was remanded for further hearings on the issue of negligence. Among other things, Judge Harlan stated at page 16:

"The lower Court held assumption of risk to be no defense because it found that Dixon had no reason to believe that the upper rungs of the ladder were in a dangerous condition, and also because as a matter of law the defense was invalid. We think both grounds were correct. * * * As to the second, the American courts have uniformly refused to allow assumption of risk as a defense to a seaman's action for injuries under the general maritime law. * * * *"

While the above case involved a seaman and member of the crew, it is significant as a statement of the principle of maritime law involved, i.e., that only the admiralty defense of comparative negligence, and not the common-law defenses of asumption of risk and contributory negligence is available. See *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409, 74 S. Ct. 202, 205, 98 L. Ed. 143 (1953); *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, 431, 59 S. Ct. 262, 266, 83 L. Ed. 265 (1939); *Imperial Oil Limited* v. *Drlik,* 234 F. 2d 4, 9 (6 Cir. 1956).

Basically the *Broecker* case, *supra,* is no more nor less than a recasting of the assumption of risk doctrine. Instead of setting the matter forth as a defense, it is cast as a rule of "no duty." The fallacy of this device is demonstrated when it is considered what the situation would be if someone else, say a telephone lineman, installing a telephone line, had been injured. The duty of the landowner to the invitee would exist, but the common-law defense of assumption of risk would not be available. The common-law defenses are more fully discussed under Point V, *infra.* They are mentioned here only to show the unsound basis of the *Broecker* decision as applied to negligence under the general admiralty law.

The evidence establishes that the petitioners, their officers and men, at all times were in control of the vessel and the place where the deceased was working. While it is

true that El Dorado people were repairing the pump it is equally true that the officers and crew of the vessel actively inspected the area and they participated in all activities conducted.

In this connection it would be well to keep in mind the facts in *Hawn* v. *Pope & Talbot, Inc.*, cited *supra*, which are stated in the Court of Appeals opinion by Judge McLaughlin. In that case the injured party was "a ship's carpenter foreman." At the time of the accident he and other employees "were making certain minor adjustments to the grain feeders." He "slipped on some loose grain underfoot, fell through an opening caused by the absence of a hatch board to the hold below." There was testimony that the hatch covers had been missing the day before and the morning of the accident. A jury found that the vessel was unseaworthy and also that both plaintiff's employer and the defendant bare-boat charterer were negligent. In discussing negligence, Judge McLaughlin stated at page 803:

> "* * * *. Hawn was working for an intermediate employer. That employer, third party Haenn Corporation, was functioning under its contract with the record owner of the ship. However, there is not the slightest indication that as the ship was temporarily berthed at Philadelphia the appellant had surrendered actual control over it. Under those circumstances appellant was faced with its duty of providing Hawn who was engaged in the ship's service a reasonably safe place to work. * * * *"

In view of the facts and the law cited above the conclusion of the trial court that the owner of the vessel was not under any duty "to protect the workmen of the independent contractor, El Dorado Oil Works" was erroneous as a matter of law (R. 576). The petitioners, as the owners of the vessel had a primary non-delegable duty to provide the

deceased a reasonably safe place to work. This they knowingly failed to do.

POINT III

The petitioners owed the deceased the non-delegable duty to provide the deceased a seaworthy vessel and its failure to do so constituted a wrongful act, neglect or default such as would if death had not ensued, have entitled the person injured to maintain an action for damages.

That the libellant has a cause of action for death based on unseaworthiness under the New Jersey Wrongful Death Act as well as for negligence was discussed under Point I of this brief.

The deceased, although not a member of the crew of the vessel, had come aboard for the purpose of repairing equipment being used in discharging oil cargo and was entitled to the protection of a seaworthy vessel.

The U. S. Supreme Court in its decision in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) extended to persons occupying the status of the deceased, the shipowner's liability for unseaworthiness enunciated in the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

In *Pope & Talbot* v. *Hawn, supra*, the plaintiff, a carpenter, employee of a refitting company, recovered against the owner of a vessel for an unseaworthy condition. Mr. Justice Black, in affirming the decision of this court, held that a duty to provide a seaworthy vessel was owed to plaintiff. He stated at page 413:

> "• • •. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed

a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Except for the fact that petitioner's vessel was unloading oil rather than loading grain, the above quotation could be directly applied to the present case.

The employees of El Dorado were engaged in discharging oil from the respondent's vessel. The oil was cargo in the same sense that rubber bales or cartons of goods, or sacks of flour would be cargo. Certainly those engaged in discharging oil are no less engaged in work traditionally done by seamen than those discharging other forms of cargo would be. Their functions are basically the same as longshoremen.

Some ships have their own equipment for discharging oil (R. 501). Where equipment is brought on board by those discharging the oil, it merely means that equipment from the shore was used in lieu of ship's equipment. The situation is not uncommon in longshore work. We note that the equipment which was brought on board was used in conjunction with the ship's equipment, *i.e.*, the winches, the heating coils, etc.

The deceased had a function to perform in connection with the unloading of the cargo. It was his job to put in working order the pump used to discharge cargo. Certainly if this were the ship's equipment for discharging oil, this function would be performed by a member of the ship's crew if the work was within the ambit of his skill. It normally would be. Compare: *American Steamship Com-*

pany v. *Copp*, 245 F. 2d 291 (9 Cir. 1957) where the employee of an independent contractor who was dismantling grain fittings, removing charterer's property and refurnishing a ship was held to be entitled to a seaworthy vessel; *Torres* v. *The Kastor*, 227 F. 2d 664 (2 Cir. 1955) where it was held that a workman employed by an independent contractor engaged in cleaning loose pitch from a vessel was entitled to a seaworthy vessel; *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262 (6 Cir. 1955) where it was stated that a shipfitter's helper employed by a contractor who was making repairs to a vessel during its winter layup was "probably within the broadened class of workers" to whom a duty to provide a seaworthy vessel was owed; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (3 Cir. 1953) where a duty of seaworthiness was held to be owed to employees of a contractor hired "to clean the accumulated rust and dirt from the four deep tanks."

The test based on analogy of work was applied in *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La. 1957). In that case the libellant, a plumber-machinist, employed by an independent contractor was injured while on a scaffold replacing some salt water pipe on the vessel. The court held that the scaffolding used, whether furnished by libellant's employer or by the vessel, rendered the vessel unseaworthy and allowed recovery. Judge Wright rejected the view that the work of the libellant did not entitle him to a seaworthy vessel because it did not involve loading equipment as in the *Hawn* case. He stated at page 657:

> "* * *. The short answer to this argument is that the *S.S. Del Mar* herself regularly carries a plumber-machinist as a member of her crew. And a plumber-machinist is precisely the type of seaman qualified to repair or replace short lengths of one-inch pipe. If warranty of seaworthiness applies to landsmen aboard a vessel performing work historically per-

formed by seamen, it should certainly be applied to landsmen aboard performing work currently performed by seamen."

Any qualified member of the ship's crew could have done the work done by the deceased in getting the pumps to operate again. This is typical "ship's work."

The nature of the duty to provide a seaworthy vessel was stated in *Seas Shipping Co.* v. *Sieracki, supra,* by Mr. Justice Rutledge in footnote 11 at page 94:

> "In this connection is pertinent also the frequently stated rule that the obligation of a shipowner to provide a seaworthy ship is non-delegable. * * *"

In *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9 Cir. 1953) affirmed *per curiam* in 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), Chief Judge Denman stated that the question presented in that case was whether a vessel owner is liable for injuries received by an employee of a stevedoring company on board a ship where the injuries are caused by a breaking block brought on board by the stevedoring company. It was argued among other things that the vessel was not liable because control of that portion of the vessel on which the stevedore had been working had been surrendered to the stevedoring company. After reviewing several cases in the Courts of Appeals for the Second and Third Circuits, the opinion concluded at page 480:

> "* * *. The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based on negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here."

Mention should be made of the decision in *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 Cir. 1947) cert. den. 333 U. S. 828, 68 S. Ct. 451, 92 L. Ed. 1113 (1947), which is relied on by the petitioner (P. br. 15, 40, 55). The plaintiff was one of a group of longshoremen assigned to assist the crew of a vessel in removing a broken boom. It was held that there was no evidence of negligence in the operation of removing the boom, so that a directed verdict on that count was affirmed. As to unseaworthiness, Judge O'Connell, speaking for the majority of the court, stated in denying the claim that the boom was unseaworthy at page 722:

> "* * *. To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. * * *"

The *Bruszewski* decision does not apply factually to the present case. If the deceased in the present case, while assisting in the repair of the pump cut his hand on a broken part in the course of the repair operation, then a situation analogous to the *Bruszewski* case might be present. The deceased was interested only in the job of getting the pump to operate. That was his only duty. He had no duty with reference to the oily condition of the deck and tank cover, of the unguarded tank opening, of the placing of beams between the tanks, or of the lighting. He did not come aboard the vessel to "repair" any of these conditions. The court below did not find that the deceased had the duty to repair any of these conditions and the evidence establishes that he had no such duty. In addition, as respondent has pointed out in the discussion of the *Broecker* case *infra*, under Point II, the rule announced in those two cases is really an assumption of risk rule rather than a "no duty" rule. In the *Bruszewski* case, if the boom had injured another stevedore, not en-

gaged in the job of removing it, the duty to supply a seaworthy vessel would have been recognized. Since assumption of risk is not a defense under the general maritime law, the *Bruszewski* case brings in through the side door, a doctrine which was ejected via the front door. The *Bruszewski* decision states a narrow rule which is to be strictly interpreted.

In *Gindville* v. *American-Hawaiian Steamship Line*, 224 F. 2d 746 (3 Cir. 1955), a longshoreman was injured in the course of unloading a vessel. Suit was instituted for both negligence in loading the cargo and unseaworthiness because of the unsafe manner in which the cargo was stowed. A verdict for plaintiff was affirmed. In the course of his opinion Judge Goodrich stated at page 746:

> "• • •. The defendant asserts broadly that our decision in *Bruszewski* v. *Isthmian SS Co.*, • • •, settles this case in its favor arguing that the danger, if any, was perfectly apparent and that the plaintiff assumed the risk when he went to work in the face of such apparent danger. We think the Bruszewski case does not stand for any such sweeping proposition as this. *Indeed, it is quite narrow.* It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work. • • •" (Emphasis supplied.)

Judge Goodrich again considered the point raised in *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F. 2d 875 (3 Cir. 1957). A longshoreman had been injured when a winch cable slipped and a beam being loaded on the vessel struck him. He stated at page 877:

> "The appellant complains about the court's instruction on assumption of risk. This question need not trouble us either. As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265,

to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236, is squarely in point with just about every issue raised in this case. *A Longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness.*" (Italics ours.)

The narrow application of the *Bruszewski* opinion was recognized in *Pinion* v. *Mississippi Shipping Company, supra.* In that case a repairman was injured when a defective pipe on which he was working broke causing him to lose his balance on a narrow scaffold and fall to the deck. Judge Wright held that the repairman could not complain of the defective condition of the pipe on the basis of the *Bruszewski* case. However, he went further and stated at page 656:

"Libellant, however, is on much firmer ground with respect to his charge of unseaworthiness by reason of the scaffolding he was required to use in effecting the repairs. * * * It unquestionably was unsafe equipment with which to work. As such it rendered the vessel unseaworthy and her owner liable in damages.

Respondents' suggestion that the eight-inch plank which formed part of the scaffolding may have been brought aboard the vessel by Ferran cannot save the shipowner from liability for failure to furnish a seaworthy vessel. Whoever furnished the scaffolding, it was still the nondelegable duty of the shipowner to furnish Pinion adequate equipment and a safe place to work. * * * The fact that Pinion was injured as a

result of the unseaworthy equipment makes the shipowner liable for his damages, irrespective of fault. * * *

Respondent also suggests that if the scaffolding was inadequate, Pinion was in the best position to make that appraisal."

The court below found that the deceased had boarded the vessel "to help repair the defect and restore to operation the pump which caused the oil spill" (R. 576). There is no finding that it was the duty of the deceased to clean up the oil spill. In the case of *Mormino* v. *Leon Hess, Inc.*, 119 F. Supp. 314 (S. D. N. Y. 1953) affirmed on opinion below in 210 F. 2d 831 (2 Cir. 1954), the libellant was chief pumpman on a vessel. While repairing a valve which had leaked oil onto the deck, he stepped into the oil and fell. His action was based on the Jones Act and on unseaworthiness. Judge Leibell found, among other things, at page 317 in awarding a decree for libellant:

"There is no controversy in respect to respondent's assertion that it was libelant's duty as chief pumpman to fix the faulty valve. But Mormino was under no duty to clean oil from the deck while it was accumulating. * * *

* * * * *

"* * *. As has been stated heretofore, Mormino's duty was limited to repairing the valve. *It did not extend to the consequences of his delay in making that repair, namely to cleaning oil from the deck. That was for some member of the deck crew to do.*

"Nor is libellant barred from maintaining this action because he sustained his injuries in performance of an act designated to remove the condition which caused his injuries. In relying on such a proposition respondent impliedly invokes the doctrine of assumption of risk. * * *, a defense which is not available in a suit brought under the Jones Act. * * *" (Italics ours.)

In the case of *Rodriguez* v. *The Texas Company*, 254 F. 2d 295 (2 Cir. 1958), the plaintiff, a seaman was injured when he slipped on oil on a platform in the engine room. In affirming a judgment for plaintiff *per curiam*, the court stated at page 297:

> "* * *. The fact that plaintiff was charged with maintaining the platform in a clean condition and the question of whether or not he should have noticed the presence of the oil on the platform, while issues to be considered by the jury in determining the plaintiff's contributory negligence, if any, did not destroy the prima facie case."

In this connection compare *Boat Dagny* v. *Todd*, 224 F. 2d 208, 210 (1 Cir. 1955), where the court held that a trial court rightfully refused to charge in effect that it was the duty of the plaintiff as master of a vessel to see that defective conditions aboard the vessel were repaired, and that his failure to have brushes replaced on a generator, causing the failure of light on a vessel and his consequent injury, barred recovery under both the Jones Act and for unseaworthiness. Compare also *Mason* v. *Lynch Brothers*, 228 F. 2d 709 (4 Cir. 1956); *Sprague* v. *The Texas Co.*, 250 F. 2d 123 (2 Cir. 1957).

It is submitted that the petitioners owed to the deceased an absolute, non-delegable duty to provide the deceased with a seaworthy vessel. This they knowingly failed to do.

POINT IV

The trial court erred in not making findings that petitioners failed to provide the deceased with a safe place to work and failed to provide him with a seaworthy vessel causing his death.

(a) ***Where a trial judge, sitting in admiralty dismisses a libel on an erroneous legal ground and does not pass on the factual issues before him, his decision is fully reviewable on appeal and the appellate court can make the proper findings.***

An admiralty appeal is a trial *de novo*, except that findings of fact based upon credibility of witnesses who testified in open court will not be set aside unless "clearly erroneous." *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Petterson* v. *Alaska SS. Co.*, 205 F. 2d 478, 479 (9 Cir. 1953) aff'd *per curiam* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954). See also *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. 2d 402, 409 (3 Cir. 1953); *Barbino* v. *Stanhope S. S. Co.*, 151 F. 2d 553, 555 (2 Cir. 1945). A same scope of review applies under Rule 52(a) F. R. C. P. See *Lehmann* v. *Acheson*, 206 F. 2d 592, 594 (3 Cir. 1953). Moore, *Federal Practice* (2nd Ed. Vol. 5, Sec. 52.03(2) at page 2630.

The crux of the opinion of the trial court is the statement that the court was not persuaded "that the owner of the vessel is under any duty to protect the workmen of the independent contractor" (R. 576). This conclusion is a conclusion of law and is fully reviewable on appeal. There were no findings made as to unseaworthiness. There was no direct finding by the court that petitioners were free from negligence. By implication the court did find negligence when it stated that the owner of the vessel had no duty to protect the workmen of the independent contractor "against

the dangerous conditions created by the very work for which the independent contractor was hired" (R. 576). A large part of the factual background is undisputed. The appeal to the Court of Appeals was essentially based on erroneous application of the law to the facts and the legal conclusions to be drawn from those facts. It was therefore fully reviewable both as to facts and the law applied to those facts.

(b) *The petitioners' officers and crew remained in control of the vessel and they actively participated in the unloading operations.*

In their answer filed in this case, the petitioners admitted "the owners * * * were in possession of and operated, managed and controlled" the vessel involved although they claimed portions of the vessel had been turned over to repairmen, stevedores, etc. (R. 24).

The facts establish that the vessel including the portion of the vessel where the deceased was killed was and remained under control of petitioners, their officers and crew at all times while the incidents involved in this case occurred.

The Chief Officer of the vessel stated that he "gave orders to two members of the crew to be on board all night" (R. 299). These crew members were not loaned by the ship to El Dorado (R. 338). In fact they received overtime from the ship (R. 338). They were there to help El Dorado "to be used for ship's equipment to drive winches, and to hoist their equipment on board ship" (R. 299). The Captain of the vessel remained on board all night (350a), as did the Chief Officer and the officer on watch (R. 299). When the crewmen operated the winches they were directed by the Second Officer, who was the officer on watch (R. 301). In short, aside from other crewmen who might have been on board there were two crewmen who remained on duty

specifically in connection with the unloading operations, as well as the Chief Officer and the officer on watch who were also on duty.

Once it is admitted that the Chief Officer and the officer on watch were on duty, it is ridiculous to claim that they were not masters in their own house. This is borne out by additional facts which were developed. The Captain stated in his deposition that it was part of the duties of the Chief Officer "to look after cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (R. 74; R. 523). The Chief Officer stated that "everything concerning with the cargo" was his duty (R. 316).

The Captain stated that it was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions it was his duty to correct them (R. 76; R. 78; R. 523).

The Chief Officer stated that he inspected the vessel, while in port, at least once an hour, "going around the ship, looking in the hatches, and see that the cargo is properly discharged." These inspections he considered part of his duty (R. 318). The Captain also stated that these inspections were part of the Chief Officer's duties (R. 74; R. 523).

The Chief Officer admitted that if he observed any unsafe condition which might cause injury to anybody aboard the vessel, it was his duty to do something about it (R. 318). When asked with relation to oil which might be dropped by stevedores while working on the vessel, whether it was his duty "to see it is corrected; no matter who does it," he answered, "I guess so, if I brought it to the notice of the foreman who knew him job, he would do it. He wouldn't let oil stand around" (R. 320).

From the testimony of the Chief Officer and the Captain it appears that they recognized it was the duty of the vessel

to inspect, to look for, and to correct any unsafe, hazardous, or unseaworthy condition which existed on the vessel. This duty to provide a safe place to work and a seaworthy vessel was an absolute and non-delegable one. The contention of the Chief Officer that it was the duty of El Dorado to remove the oil because of the circumstances under which the oil came on the deck (R. 320), is a matter which may have relevance to the issue of indemnity between the petitioners and the employer of the deceased, but it does not modify the recognized duty owed to the deceased.

There is additional evidence which establishes that the vessel not only retained control of the place where the deceased had been injured, but that the officers and crew actively participated in the events leading to the death of the deceased.

The ship's crew opened up the main deck hatches first (R. 299; R. 339). The ship's crew removed and positioned the tank cover and brought the pump on board (R. 146; R. 147; R. 266; R. 339; R. 457; R. 560, Exh. R-6). The ship's crew in operating the winches were directed by the Second Officer, who was the officer on watch (R. 301; R. 339; R. 276). The ship's crew helped an El Dorado mechanic bolt a suction hose to a pump (R. 462).

The leaking of the pump was discovered by members of the ship's crew (R. 188; R. 302; R. 304; R. 560, Exh. R-6). The ship's crew put a peg into a nipple opening on the pump with a sledge hammer to stop the leak (R. 190; R. 194; R. 208). After the oil was spilled and up to the time of the accident ship's officers were in the vicinity of the oil spill (R. 154; R. 190; R. 195). At the time of the accident there were crew members on the 'tween deck but they were "up forward" (R. 210; R. 350).

After the accident to the deceased, when work was resumed, the ship's crew removed the tank cover so that they could lower the pump (R. 472). They had also put up ropes around the tank opening after the accident (R. 467; R. 469). It can also be inferred that they threw sawdust on the oil because when the first El Dorado man returned to resume operations after the accident (the El Dorado men having left the vessel after the accident to the deceased) he found that "everything had been sawdusted down" (R. 467).

On the basis of the undisputed facts there can only be a finding that the petitioners, their officers and crew never gave up control of any portion of their vessel to the employer of the deceased but on the contrary they actively participated in all the operations conducted by the employer of the deceased. Under the doctrine of unseaworthiness, as discussed under Point III of this brief, the element of control does not present an issue. Nevertheless it was there.

(c) The petitioners' officers knew of the dangerous, hazardous and unseaworthy conditions which caused the death of the decedent and they negligently failed to remedy the situation or to otherwise provide the deceased with a safe place to work.

It was established that the oil came from the break on the fitting in the hose leading from the pump (R. 153; R. 188; R. 572). The court found that the deceased "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (R. 573).

When the El Dorado men first saw the oil spill, officers of the vessel were in the vicinity of the pump (R. 154; R. 190). Ship's officers were present while the El Dorado men were inserting a new fitting (R. 154; R. 155). There was testimony that before the accident, about midnight, members of the crew did some cleaning in the forward

part of the vessel (R. 224). In view of all this it cannot be denied that the vessel, its officers and crew had knowledge of the dangerous and unseaworthy condition which existed at least one hour before the death of the deceased. The vessel's own log entries bear this out (R. 560, Exh. R-6).

In addition, the petitioners' Chief Officer stated that at about 15 minutes past midnight, he went on deck following a report from his Third Officer, who was on watch, and he observed oil spurting out of a hole in the pump line (R. 304). After he had examined the cargo for damage, he talked to Mr. Sexton, the receiving foreman of El Dorado. He claimed that he told him (R. 305):

> "* * *. Well, I told also to sweep the tank hold—the tank covers, where the crew was working on. And I offered to give them sand and sawdust to strew around the platform where they were working on, in order to minimize the danger of slipping in the oil."

This statement also establishes that the vessel, by its officers, had knowledge of the dangerous condition resulting from oil being on the deck prior to the time the deceased came on board and was injured. The part of the conversation relating to the putting the sand or sawdust on the oil was denied by Sexton (R. 484). However, in so far as libellant is concerned it makes no difference whose version of this allegation is accepted. The duty of the vessel to provide a seaworthy vessel and a safe place to work was a non-delegable one so far as the deceased was concerned. The admitted knowledge of the danger and the method of removing it which was available was not used and this establishes not only that an unseaworthy condition existed but negligence on the part of the vessel as well.

In the case of *United States* v. *Harrison,* 245 F. 2d 911 (9 Cir. 1957) a longshoreman had slipped on an oily deck. The deck had been covered with oil when the work started.

The evidence showed that the stevedore gang boss had complained of the condition to the officer in control of the vessel. A judgment for plaintiff was affirmed. Among other things, Judge Fee in his opinion stated at page 916:

> "* * *. The unseaworthiness of this vessel created a non-delegable duty upon the agents of the government to render her seaworthy immediately. The defect was not latent, but was patent to everyone who saw the deck. If the defective condition had been concealed and the Stevedoring Company had been the first to discover it, then a burden might have been placed upon the latter under the contract. But the duty to keep the ship seaworthy, where the conditions are open and notorious to all who looked, is not only non-delegable, but continuous upon the shipowner, master and crew."

In *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (9 Cir. 1949) the libellant, a longshoreman, was injured when a large hatch cover fell on him. The appellate court found as a fact that the sole proximate cause of the injury to the libellant was the negligence of his employer in its use of the hatch with knowledge of its defects of dogs and pins. The court gave indemnity to the government, as owner of the vessel, against libellant's employer. In the course of his opinion, Chief Judge Denman stated at page 329:

> "The government admits liability to the stevedore because it had a continuing duty to him to see that at all times he had a safe place to work, and is so liable to him for a failure to keep the vessel seaworthy in that regard. Such liability exists even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover but, as the government claims, its conscious use with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams."

In *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753 (9 Cir. 1956) a stevedore had sued a shipowner for injuries received when a strongback with a defective locking device was dislodged by a bridle and hook manipulated by a winch operator causing injury to the stevedore. He sued on theories of negligence and unseaworthiness. The shipowner settled and then sued his employer. The court reversed a judgment below and granted indemnity. In concluding that the employer, Marine Terminals Corp. was primarily negligent, Judge Hamlin stated, among other things, at page 759:

> "* * *. Here, Marine was charged with notice before the accident from the ship's officer that some strongbacks were defective and from its own employees that the particular strongback involved here had no lock and was unsafe. It would have taken little time to remove the lockless beam. * * *"

In both of the above cases, the vessels, by their respective officers, had knowledge of defective, dangerous, and unseaworthy conditions on board. In both cases it was recognized that the shipowner had breached its duty to provide a safe place to work and a seaworthy vessel even though the shipowner successfully transferred its liability on a theory of indemnity to the employer of the injured party. As far as libellant is concerned it is immaterial whether petitioners in this case are successful in transferring their liability to the respondent-impleaded. The duty of petitioners to the deceased is the same whether indemnity is granted or not.

As has been pointed out in our prior discussion, it makes no difference who or what creates the unsafe and hazardous conditions, the duty of the shipowner to provide a seaworthy vessel and a safe place to work remains the same. For example in *Oakes* v. *Graham Towing Co.*, 135 F. Supp.

485 (E. D. Pa. 1955) a seaman settled his case against a shipowner. The shipowner successfully sought indemnity from the drydock. Before granting indemnity against the shipyard where the vessel had been drydocked at the time, Chief Judge Kirkpatrick had to find that the shipowner was justified in making a settlement with the seaman and he did. The seaman had been injured because of grease and oil on a ladder he used to get on the ship. The court stated among other things at page 486:

> "The floor of the drydock was littered with equipment and covered with oil and grease. Men traversing it were bound to get grease on their shoes, which is undoubtedly the way in which the grease came to be on the ladder.
>
> "Regardless of who furnished the ladders, they constituted the only means for the ship's crew to get off and on the ship and, as such, became a part of the ship itself. The shipowner's failure to keep the ladder free of dangerous accumulations of grease made the ship unseaworthy and, in addition, constituted negligence."

In the *Oakes* case the grease and oil came on the ladder because of a condition created by the drydock company and not by the shipowner, yet the court found not only that an unseaworthy condition existed but that the shipowner was negligent in spite of this fact.

In *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956) a longshoreman was injured when he fell through an open hatch while working on board a vessel owned by the defendant but chartered to another. A decree for respondent was reversed with directions to enter a decree for libellant. In the course of his opinion Judge Learned Hand stated that although the libellant and another longshoreman had laid the wrong hatch cover over a "pad-eye" so that it

wobbled causing him to fall subsequently when he stepped on it, the vessel was unseaworthy because of the condition created. The court's statement on this point was reemphasized on a petition for rehearing where the court *per curiam* stated at page 925:

> "The respondents are right in saying that it was not the libellant and DiDonna who misplaced the cover that later rocked and made the libellant fall. This was misplaced by two other members of the same gang before the libellant and DiDonna walked over it. It is impossible to see what conceivable difference this can make in the result; indeed, if anything, it confirms our ruling."

In view of the law as set forth in the above cases and in the cases discussed under Points II and III concerning the non-delegable duty of the vessel owner to provide a seaworthy vessel and a safe place to work, it follows *as a matter of law* that the Chief Officer of the vessel could not avoid the responsibility of the vessel by any statement or "suggestion" he made to Mr. Sexton.

The Chief Officer admitted that sawdust is put on oil "not to slip" and he stated he would "consider it safer to have sawdust on oil instead of having nothing" (R. 322). After the accident the ship's crew put ropes around the tank opening (R. 469), and everything was "sawdusted down" (R. 467). If the oil had been cleared away and the area sawdusted before the accident to the deceased, the accident could have been avoided.

The evidence indicates that the last oil came from the break when the ship's crew put the peg in the nipple of the pump and stopped the leak (R. 190). This was before midnight according to the recollection of Russo and Donohue (R. 157; R. 190), although the ship's log entry for this was 15 minutes after midnight (R. 560; Exh. R-6).

The log entry dealing with the death of the deceased is timed at 1:25 a. m. (R. 560; Exh. R-6). This means that the ship's officers had knowledge of the unsafe and dangerous condition created by the existence of oil on a tank cover, hatch beams, and adjoining area near an open unguarded tank of hot oil for *at least one hour* before the deceased came on board.

The officers of the vessel knew of the dangerous and unseaworthy conditions which caused the death of the deceased. They had the means to remove them or to guard against them. They had ample time to do so. In so far as unseaworthiness is concerned this element of notice and knowledge is immaterial. It was there nevertheless.

(d) *The deceased came on board petitioners' vessel to assist in repairing the pump and restoring it to operation but he had no duty to repair, remove or correct the dangerous and unseaworthy conditions which caused his death.*

The court below specifically found that the deceased, "a maintenance foreman employed by El Dorado, was called from his home to assist in repairing the pump and restoring it to operation" (R. 573).

Before petitioners' vessel came in the deceased had checked the pump, with a machinist named Wagner. They were satisfied that it was in good working condition and it was then taken to the pier, to await the arrival of petitioners' vessel (R. 454). The deceased was not there when the pump was placed on board petitioners' vessel or when it started operation (R. 460). He was home with his wife having coffee and pizza pie when he received a call to come down to the pier to assist in getting the pump operating again after it had developed the leak which was stopped and then repaired (R. 134; R. 484; R. 156). The deceased did not go on board and did not have any duty

to perform on board petitioners' vessel until he boarded it in response to a call a short time before his death.

No claim can be made that it was the duty of the deceased, or that the deceased in any way, placed or even supervised the placing of the pump on petitioners' vessel, that the deceased placed or even supervised the placing of the tank lid on the tank top, that the deceased placed or supervised the placing of the beams in the walkway between the tank tops; that the deceased had the duty to clean or even the duty to supervise the cleaning of oil from the area around the tank lid. The uncontradicted evidence shows that the duty of the deceased prior to and at the time of his death was "to help repair the defect and restore to operation the pump which caused the oil spill" (R. 576).

In *Mormino* v. *Hess*, quoted *supra* under Point III of this brief, the court found the vessel owner negligent and liable to a chief pumpman who was injured on oil from a leaking manifold valve. The court found that the libellant had the duty "to fix the faulty valve" but that he was under "no duty to clean the oil from the deck while it was accumulating." Judge Leibell found that "cleaning oil from the deck would fall under the heading of 'general cleaning'" pursuant to a union contract and that these duties could not be assigned to a chief pumpman (119 F. Supp. 314, 317). In the present case it is clear that the deceased was a maintenance foreman. Everything which had to do with the receiving of oil was under the jurisdiction of Mr. Sexton who had been there all night (R. 165; R. 491). The plant superintendent who was superior to both the deceased and Sexton was Mr. Blaney (R. 227). In explaining the duties of Mr. Russo, a maintenance mechanic, who had been on duty that night, Mr. Sexton stated (R. 498):

> "Salvatore Russo was loaned from the Maintenance Department, which was due to a union deal that we

had down there, Salvatore Russo was connected with the Maintenance Department and we had to have a maintenance man on the pump."

This indicates that there was a clear and definite division of functions at the El Dorado plant. Cleaning oil from the deck, beams, tank top of petitioners' vessel was not a function assigned to the deceased.

There was some dispute relating to the issue of who had the duty to clean up the spilled oil as between the vessel and El Dorado.

There was testimony that it was the practice for the ship's crew to clean up oil from pumps (R. 515; R. 200). The Chief Officer claimed that if oil was spilled on the deck by the ship's crew he recognized that it was the ship's duty to remove it, but he felt that if it was a stevedore who soiled the deck it was the stevedore's duty and not that of the ship (R. 319). Obviously if the ship had a non-delegable duty to provide a safe place to work and a seaworthy vessel, the distinction claimed by the Chief Officer has no validity as far as libellant is concerned.

In this connection we note that the Chief Officer admitted that the vessel carried sawdust, although he denied the statement of his own Captain that the purpose of the sawdust being carried was to dry up oil and water if spilled (R. 92; R. 325). He admitted that sawdust is put on oil so that it would not be too slippery (R. 322). The Chief Officer claims he "suggested" to Mr. Sexton, the El Dorado receiving foreman, that sawdust be applied (R. 347; R. 560; Exh. R-6). The El Dorado foreman denied this (R. 484). The fact that the vessel transported oil and had sawdust on board which was used to dry up oil and water lends credence to the fact that the ship recognized its duty to clean the oil or to reduce hazards arising from its presence.

The evidence does not establish that it was the duty of the deceased to remedy the dangerous and unseaworthy condition created by the existence of oil on a tank lid, beams, and deck area near an open tank of hot oil.

(c) *The deceased exercised due care for his own safety.*

The dissent in the Court of Appeals, based on New Jersey law stated that it appeared that the deceased had known of the dangerous condition and had therefore assumed the risk as the New Jersey courts would apply the doctrine (R. 595). In the first place it does not appear as a fact that the deceased knew that the oil on the deck in the area of the tank had not been cleaned up or that some steps had not been taken by the vessel to correct any hazards created by the oil spill. It would have been reasonable for the deceased to have assumed that all was safe because work was being done in the area when he arrived. Secondly, there is a presumption that the deceased used due care. *Watn* v. *Pennsylvania Railroad Co.*, 255 F. 2d 856 (3 Cir. 1958). Finally, the matter is regarded in New Jersey law as a question of fact involving the defense of assumption of risk, a defense which must be proved by the defendant. Cf. *Hendrikson* v. *Koppers Co.*, 11 N. J. 600, 95 A. 2d 710 (1953).

The deceased was not aboard petitioners' vessel when the oil spilled. He was not on duty at that time but was at home. At the time he left the plant, he had checked the pump with a machinist named Wagner and they found the pump in good working order (R. 455). The pump was then left on the pier to await the arrival of the vessel. O'Leary, another mechanic, installed the pump when the vessel arrived. He found the pump working satisfactorily (R. 459). Mr. Sampson, who was a standby on the pump from 9:00 p.m. to 11:00 p.m., found the pump operating "very good" (R. 476). There certainly was no evidence

that the deceased knew or should have known of the defective condition of the pump or that he should have anticipated the way in which it would be placed on the tank top.

When the deceased came to the vessel that night, he was entering the area where the tank and the pump were for the first time. He had not conducted any general inspection of the premises as the Chief Mate had done. He had not been working in the immediate area of the pump where Russo and Donohue had been working. He had not been standing around as the officers of the vessel had been doing. He was concerned with one immediate problem and that was to help Russo and Donohue to get suction on the pump (R. 158; R. 197).

When the deceased walked to the pump, Mr. Russo testified that he had been walking "just normally like taking his step" (R. 199).

Not only does the deceased have the benefit of the presumption that he exercised due care, but there is no evidence in the record that would justify a finding to the contrary.

POINT V

The defenses of contributory negligence and assumption of risk are not available in a wrongful death action based on a maritime tort and in addition there was no evidence to establish that the deceased had been negligent or that he assumed the risk of petitioners' negligence or of unseaworthy conditions.

We have already discussed the referral nature of the New Jersey Wrongful Death Act. Since the New Jersey statute, by its terms, gives a right to recovery based on the maritime rights and duties relating to unseaworthiness, then it incorporates all of the maritime law relating to standards of care, etc., that go with it. In *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958), Judge Learned Hand stated at page 712:

> "* * *. Although, as we have said, we are not dealing with 'federal maritime law,' we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights 'rooted in federal maritime law' as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. * * *. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

The trial court made no findings either as to assumption of risk or contributory negligence. The Court of Appeals, in view of the lack of findings in this regard did not "decide factually what defenses, if any, might be available to the respondent" (R. 588).

We note that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 *et s q.* does not anywhere state that contributory negligence is a defense to an action under the act. Cf. *The Devona,* 1 F. 2d 482, 484 (D. C. Me. 1924). The substantive law relating to liability is incorporated by reference and is coextensive with the substantive law of liability for personal injury as distinguished from wrongful death.

It is not questioned that in common-law actions arising under the New Jersey Wrongful Death Act, common-law defenses are applied. The act itself measures liability by the test of whether or not the deceased, if death had not ensued, would have been able to maintain an action. Obviously in a common-law action, which is what is involved in all the New Jersey decisions cited by petitioners in their brief, the common-law defenses would bar recovery. Logically, therefore, in a maritime case, the maritime defenses should prevail because the act itself refers to the substantive rules of maritime law in such cases.

Even as a matter of statutory construction, the courts must imply a *sang-froid* to the New Jersey legislature in order to hold that whereas a seriously injured father and husband is entitled to a recovery under the maritime law even if contributorily negligent, his wholly innocent children and wife would be denied such recovery if he dies from his injuries. The legislature has not set forth this defense in the statute. Courts do not construe statutes in such a way as to produce harsh or absurd results. See *Cox* v. *Roth,* 348 U. S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Giordiano* v. *City Commission of Newark,* 2 N. J. 585, 67 A. 2d 454, 458 (1949). This statute is a remedial one and is entitled to a liberal construction. Therefore under the terms of the New Jersey statute itself, independently of any compulsion from a positive rule of maritime law, the rights of a widow and children with

reference to the contributory negligence of a deceased workman are coextensive with the rights he would have enjoyed had he lived.

There is another ground for holding that contributory negligence is not a defense under the maritime law where a state wrongful death act is applied. The reason that maritime law permits a state wrongful death act to be applied where certain individuals die as a result of injuries received on navigable waters within a state's geographic boundaries is that there is a void in the maritime law on this point. Congress in the development of maritime law has not afforded any remedy by statute for wrongful death in such circumstances. While there is a void as to wrongful death this is not true concerning the defense of contributory negligence. Admiralty courts have fashioned a strong positive rule concerning comparative negligence. While the enforcement of a state statute giving a remedy for wrongful death merely fills a void, the enforcement of a state rule of contributory negligence would collide with the positive, well established rule of comparative negligence in maritime law.

In the case of *Wilburn Boat Company* v. *Fireman's Fund Insurance Company,* 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) Mr. Justice Black, in holding that state laws could be applied in disputes arising from a maritime insurance policy stated at page 370:

> "Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. * * * But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. *In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States.* As later discussed in more detail, this state regulatory power, exercised with

federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since *in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.* * * *" (Italics ours.)

What, then, is the substantive maritime law as it relates to liability for personal injury? In *Hawn* v. *Pope & Talbot, Inc.*, 198 F. 2d 800 (3 Cir. 1952), Judge McLaughlin stated at page 806:

"* * * Appellant advances the flat proposition that since it is a diversity action the Pennsylvania contributory negligence rule which defeats recovery must be applied. * * *

"We think that appellant's view is incorrect. * * *"

On appeal the judgment of the court was affirmed in 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 408:

"(a) *The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.* Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which auto-

matically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

"(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features. * * *' * * * And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling.* While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * *" (Italics ours.)

In *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (1 Cir. 1954); cert. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955), Judge Woodbury reviewed several decisions, including one from this circuit, and discussed the question of contributory negligence under a state wrongful death act. He stated at page 711:

"* * * But these cases were all decided prior to Pope & Talbot, Inc. v. Hawn, 1953; 346 U. S. 406, 74 S. Ct. 202 wherein the Supreme Court of the United States in a civil action on the law side under the sav-

ing clause for the first time held categorically that the rights of a shore worker to recover for personal injuries short of death occurring on a vessel in the navigable waters of a state resulting from either the negligence of the shipowner or the unseaworthiness of the vessel are to be determined by the general maritime law and not by the law of the state within whose waters the accident occurred. That case, of course, is not squarely in point here, but in the Court's opinion 346 U. S. at page 409, 74 S. Ct. at page 205 it is said by way of dictum that 'Even if Hawn were seeking to enforce a state-created remedy for this right (referring to his right of recovery for unseaworthiness and negligence), federal maritime law would be controlling.' Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S.S. Co., 1918, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important. * * *"

In *The Devona*, 1 F. 2d 482 (D. C. Me. 1924) the court had before it the Maine Wrongful Death Act which uses the same key phraseology as the New Jersey Act. In

denying the applicability of the common-law defense of contributory negligence, Judge Held stated among other things at page 484:

> "The case at bar also discloses rights distinctly maritime and 'recognized by the law of the sea,' without regard to the court where the libelant may seek relief. The libelant must take the state statute with its limitation; *but the limitation of contributory negligence is not found in the statute.* A state court may well find that it cannot settle a maritime case by the common-law rules of procedure, and must enforce the libelant's rights under the maritime provisions as disclosed in the Jensen Case, which has held that 'no state has the power to abolish the well-recognized maritime rule concerning the measure of recovery, and substitute therefor the full indemnity rule of the common law.'" (Italics ours.)

There are two distinct grounds for holding that contributory negligence is not a defense to this action under the New Jersey Wrongful Death Act. The first is based on the interpretation of the act itself. The act does not state that such defense is available in an action for wrongful death. On the contrary, the referral phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages" is used, N. J. S. A. 2A:31-1. This phrase, by referring to the rights of the person injured, if death had not ensued, indicates that not only is the substantive law relating to the nature and scope of liability for personal injury incorporated into the wrongful death act, but the defenses are incorporated as well. There is certainly no reason to suppose the legislature intended to give any better or stronger defense to the petitioners where a widow and dependent children sue than where the injured himself sues.

The second ground is based on the fact that the injury occurred on navigable waters of the United States and is

covered by substantive maritime law which supersedes and overrules inconsistent state law. The doctrine of comparative negligence is a positive rule of maritime law and is firmly embedded in maritime law. There certainly is no reason why it should be replaced by a harsh and inconsistent state doctrine.

In this connection we note that *Klingseisen* v. *Costanzo Transportation Co.*, 101 F. 2d 903 (3 Cir. 1939) cited by defendant, held that in an action under maritime law applying the Pennsylvania Wrongful Death Act, the absolute defense of contributory negligence would be applied. In that case the deceased was drowned in a collision between his own boat and a steam boat. No issue of unseaworthiness was involved. Since this case involved an application of a Pennsylvania statute and its interpretation by Pennsylvania courts it is not controlling in an interpretation of a New Jersey statute.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. ss1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania statute does not not employ the "such as" test of the New Jersey statute which incorporates the test of liability based on the rights of the deceased if he had lived.

CONCLUSION

The evidence is overwhelming that the presence of oil on the tank lid, beams, and area near the open unguarded tank of hot oil rendered the place of work dangerous, hazardous, and unsafe and the vessel unseaworthy. The Chief Officer of the vessel who knew of these conditions, at least an hour before the accident to the deceased, stated as much. There were means on board by which the Chief Officer and his crew could have remedied the conditions. They were not used.

Whatever may have been the duty of the employer of the deceased, the duty of the vessel to provide a safe place to work and a seaworthy vessel was non-delegable. Respondent has established her claim against petitioners and should be given an award for the monetary damages sustained by herself and her three infant children.

WHEREFORE, respondent requests that the judgment of the United States Court of Appeals be affirmed with costs on this appeal.

Respectfully submitted,

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